

**Salva v Levine**

2009 NY Slip Op 30313(U)

February 9, 2009

Supreme Court, New York County

Docket Number: 150144/2008

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN  
Justice

PART 12

GLADYS SALVA, Et Al.

INDEX NO. 150144/08

MOTION DATE 12/17/08

MOTION SEQ. NO. 001

MOTION CAL. NO. 8

- v -

Dorothea Levine, Et Al.

The following papers, numbered 1 to 5 were read on this motion to/for Compel

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1, 2  
3  
4, 5

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

**FILED**

FEB 13 2009

COUNTY CLERK'S OFFICE  
NEW YORK

*[Signature]*

Dated: 2/9/09

cc 2/18/09 11Am - previously scheduled J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 12

----- X  
GLADYS SALVA, VICKIE VARNUSKA,  
FERNANDO ROQUE, ZENAIDA ROQUE,  
ROSALBA ALMANZAR, YOLANDA KAMINSKY,  
LILLIAN DEL RIO, GLENDA SWANSON-MASSA,  
JEFFREY DODSON, AIDA WENZELL, ENRIQUE  
TRIANA, KAREN BECK, JOHN GALLAGHER,  
ANA MORALES and DIGNA WENZELL,  
Plaintiffs,

Index Number 150144/2008  
Submission Dates 12/17/08 (001)  
& 12/12/08 (002)  
Mot. Seq. Nos. 001 & 002  
**DECISION & ORDER**

-against-

DOROTHEA LEVINE, GREG HEALY, TYVAN HILL  
PROPERTIES, INC. and TYVAN HILL COMPANY,  
Defendants.

**FILED**  
FEB 13 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

----- X  
**For Plaintiffs :**  
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New York, NY 10016-6819  
212-889-2121

**For Defendants:**  
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New York, NY 10017  
212-661-0500

Papers considered in review of this motion brought by order to show cause and motion for default judgment:

<u>Seq. 001</u>	<b>Papers</b>	<b>Numbered</b>
	Order to Show Cause and Affirm. in Supp. Annexed.....	<u>1</u>
	Emergency Affirmation.....	<u>2</u>
	Affidavit in Opposition.....	<u>3</u>
	Reply Affidavit.....	<u>4</u>
	Reply Affirmation.....	<u>5</u>
<u>Seq. 002</u>	Motion for Default Judgment and Affirm. In Supp. Annexed.....	<u>1</u>

**PAUL G. FEINMAN, J.:**

In motion sequence number 001, defendant Dorothea Levine moves to compel plaintiffs (1) to pay use and occupancy arrears, (2) to pay ongoing use and occupancy and/or rent, (3) to provide access to their respective apartments for repairs, and (4) to pay her costs and attorney's fees. Plaintiffs, Ms. Levine's tenants, oppose the motion, and in motion sequence number 002, move for entry of a default judgment against defendant Levine based on her alleged failure to

\* 3 ]  
answer the complaint. The two motions are joined for purposes of decision.

Plaintiffs are tenants of a residential building at 452 Fort Washington Avenue, New York, New York, which is owned and managed by defendants. The present motions are the latest in a litany of administrative and judicial proceedings over the condition of the property and payment of rent. Plaintiffs commenced this Supreme Court action on July 19, 2008, seeking damages in the amount of \$18,000,000 for intentional infliction of emotional distress and breach of the warranty of habitability. They also seek a declaratory judgment and attorney's fees. Defendants answered on August 18, 2008, counterclaiming for back rent. There are already five summary proceedings currently pending in New York City Civil Court, Housing Part, where the building's tenants and the New York City Department of Housing Preservation and Development seek to compel defendants to remedy building and housing code violations, while defendants seek back rent and access to the leased premises.<sup>1</sup>

#### **I. Defendant Levine's Motion to Compel**

Defendant Levine's motion to compel the plaintiffs to pay outstanding rent or use and occupancy and/or to provide access to their apartments is denied without prejudice to renew these applications in the Civil Court, Housing Part, which is the more appropriate forum to address the issues presented in the motion. Although a court of "limited jurisdiction," with regard to the issues raised in defendant Levine's motion, the Civil Court, Housing Part has the specialized expertise, experience and jurisdiction to grant her and the other defendants full relief. The Legislature created the New York City Civil Court's Housing Part to hear "actions and

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<sup>1</sup>*Salva et al. v 446-452 Fort Washington Avenue, et al.*, Civil Court, New York County, Index No. 22068/2008; *Salva, et al. v Tyvan Hill Co. et al.*, Civil Court, New York County, Index No. HP 6399/2008; *DPHD v Tyvan Hill Co. et al.*, Civil Court, New York County, Index Nos. 579/08, 580/08, and 751/08.

proceedings involving the enforcement of state and local laws for the establishment and maintenance of housing standards, including, but not limited to, the multiple dwelling law and the housing maintenance code, building code and health code of the administrative code of the city of New York" (CCA §110[a]). It may enforce all state and local laws for the establishment and maintenance of housing standards (CCA § 203[k]). It may grant equitable relief, including injunctions and restraining orders, to enforce any state or local housing and building laws (CCA § 203 [o], § 209 [b][4]). It has jurisdiction over summary proceedings brought by a landlord to recover possession of real property, to remove tenants therefrom, and to render judgment for rent due without regard to amount (CCA § 204). In addition, in the exercise of its jurisdiction, the Civil Court has all the powers that the Supreme Court would have in like actions and proceedings (CCA § 212). Here, where defendant Levine seeks rent arrears and access to plaintiffs' individual apartments, the Civil Court, Housing Part has jurisdiction pursuant to the Civil Court Act to grant complete relief as it may deem appropriate.

While this court, as a court of "general jurisdiction," has the authority to grant the relief defendant Levine seeks, the Court of Appeals has long ago indicated that to promote effective administration of the courts and to avoid undue complication of the resolution of landlord-tenant disputes by multiple courts handling the same dispute, when the Civil Court has jurisdiction over a landlord-tenant dispute and can decide the dispute, it is desirable that it do so (*Post v 120 East End Avenue Corp.* 62 NY2d 19, 28 [1984], citing *Lun Far Co. v Aylesbury Assoc.*, 40 AD2d 794 [1<sup>st</sup> Dept 1972]). Thus, in *Post*, in a commercial landlord-tenant dispute, the Court of Appeals ruled that availability of a ten-day stay of lease forfeiture (RPAPL 753 [4]) in Civil Court obviates routine applications for *Yellowstone* injunctions in Supreme Court (62 NY2d 19). This

\* 5 ]  
approach furthers expeditious resolution of disputes, permitting both parties to avoid the expense and duplication of effort involved in proceeding in two courts (*Id.*).

This approach continues to be adhered to in the courts, in both commercial and residential landlord-tenant disputes. The court in *Cox v J.D. Realty Assocs.* (217 AD2d 179 [1<sup>st</sup> Dept 1995]) dismissed a landlord-tenant dispute masquerading as a declaratory judgment action. In *Jone v Simkowitz* (163 AD2d 77, 79 [1<sup>st</sup> Dept 1990], *lv denied* 77 NY2d 801 [1991]), the court found that, absent a special need or circumstance, matters regarding landlord-tenant relationships should be heard in Civil Court. In *Kanter v East 62<sup>nd</sup> St. Assocs.* (111 AD2d 26, 27 [1<sup>st</sup> Dept 1985]), the court denied a preliminary injunction request partly because the tenant could obtain full relief in Civil Court by defending a summary proceeding. In *Glen Briar Co. v Silberman* (129 Misc 2d 439, 442 [Sup Ct NY County 1985]), the court denied a preliminary injunction request made by landlord, because a long history of prior similar disputes in Civil Court made it the proper forum for the action.

The dispute between plaintiffs and defendants here is twofold and not unfamiliar to the Civil Court, Housing Part: on one hand, the alleged failures by defendants to bring the premises at 452 Fort Washington Avenue, New York, New York in compliance with state and city housing regulations and, on the other hand, the extended non-payment by plaintiffs of rent owed which, along with disputes about access, have allegedly interfered with the landlord's ability to bring the building into full compliance with various building and other safety codes. Such a dispute is squarely within the jurisdiction of Civil Court under CCA §§§ 110, 203, 204. The record shows that the parties have a long, protracted history of disputes filed in Civil Court. The issues of rent and access to apartments for the purpose of effecting repair were most recently addressed in the

Civil Court, Housing Part on December 3, 2008, at a hearing where the parties entered into a stipulation regarding scheduling of restoration work. The rent is being currently paid by tenants into an escrow account set up by plaintiffs' counsel, which was authorized by Civil Court under Multiple Dwelling Law § 302 [a], [c] (*see* Salva's affid. ¶15; *see also* Bianchi's affirm. ¶5).<sup>2</sup> It would be inappropriate for this Court to intervene in the proceedings currently pending in Civil Court at this juncture given that Court's familiarity with the parties, their competing arguments, and their history of compliance or non-compliance with that Court's orders. Therefore, the defendant Levine's motion is denied without prejudice to renew in the appropriate forum, the Civil Court, Housing Part.

## **II. Plaintiffs' Motion for a Default Judgment**

An application for a default judgment is governed by CPLR 3215 which requires: proof of service of the summons including a complaint or CPLR 305 [b] notice; proof of the claim and proof of the default (*see* Siegel, New York Practice, sec 295 [4th ed. 1999]). Although the defendants did not submit opposition to the plaintiffs' motion for entry of a default judgment, examination of the entire County Clerk's file through the Supreme Court Records On-line Library (SCROLL) and of defendant Levine's motion papers on her motion to compel makes clear that no default in answering the complaint occurred. Included in defendant Levine's motion papers on her motion to compel, is a copy of an answer that was served on August 18, 2008, along with a properly notarized affidavit of service, dated August 18, 2008, stating that the answer was mailed to the law firm of plaintiffs' counsel. The answer is on behalf of all

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<sup>2</sup> In its responsive submission, defense counsel questions the existence and, in the alternative, appropriateness of the escrow account (*see* Roth's affirm. ¶¶ 10-13).

defendants. A copy of the answer annexed as Exhibit B to Levine's motion papers bears a stamp indicating it was filed in the County Clerk's Office on September 17, 2008. A properly executed affidavit of service raises a presumption that a proper mailing occurred, and a mere denial of receipt is insufficient to rebut that presumption (*Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]).

Hence, the record does not support the motion for a default judgment.

The parties and their counsel are encouraged to avoid future disputes about the receipt or non-receipt of pleadings by commencing their actions using the court's electronic filing system; parties need not wait for motion practice to convert an action to electronic filing.

ORDERED that defendant Levine's motion to compel is denied without prejudice to renewal in the Civil Court, Housing Part; and it is further

ORDERED that plaintiffs' motion for a default judgment against defendant Levine is denied; and it is further

ORDERED that the parties to this action shall appear for their previously scheduled compliance conference on February 18, 2009, in Part 12, Supreme Court, 60 Centre Street, Room 212, New York, NY 10007 at 11:00 a.m.

This constitutes the decision and order of the court.

Dated: February 9, 2009  
New York, New York

  
\_\_\_\_\_  
J.S.C.

(2009 Pt 12 D&O\_150144\_2008\_001 ms)

**FILED**  
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